

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN MICHAEL SMITH,

Defendant-Appellant.

UNPUBLISHED

April 11, 2006

No. 259439

Macomb Circuit Court

LC No. 01-000590-FH

Before: Smolenski, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of six years, eight months to 15 years in prison for manslaughter with a motor vehicle, MCL 750.321, imposed on remand. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted by a jury of manslaughter with a motor vehicle and two counts of felonious driving, MCL 752.191. Defendant was driving at a high rate of speed on 13 Mile Road when his vehicle collided with a vehicle driven by Lawrence Sourvelis. Sourvelis was killed in the accident, and two passengers in defendant's vehicle suffered disfiguring injuries. The trial court sentenced defendant to concurrent prison terms of seven years, two months to 15 years for manslaughter, and one year, four months to two years for felonious driving. Defendant's minimum sentence for manslaughter was within the statutory sentencing guidelines as scored by the trial court.

In *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2004 (Docket No. 245357), this Court affirmed defendant's convictions but vacated his sentence and remanded for resentencing on the ground that the guidelines for manslaughter should have been scored at thirty-six to seventy-one months. *Id.* at 5-6.

On remand, the trial court stated that it believed that the guidelines did not adequately account for defendant's "blatant" stupidity in driving 60 miles per hour in a 35-per-hour speed zone, or the fact that he was on probation at the time he committed the instant offenses. The trial court sentenced defendant to concurrent terms of six years, eight months (80 months) to fifteen years for manslaughter, and one year, four months to two years for felonious driving. Defendant received credit for 726 days.

To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. To be objective and verifiable, a factor must be an act or occurrence external to the mind, and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines. In addition, in departing from the guidelines, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable as a matter of law, and the determination that objective and verifiable factors merited departure from the guidelines for an abuse of discretion. A trial court may depart from the guidelines for nondiscriminatory reasons based on an offense or offender characteristic which was already considered in calculating the guidelines if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 265-269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, an appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

Defendant argues that he is entitled to be resentenced on his conviction of manslaughter with a motor vehicle¹ because the trial court failed to articulate substantial and compelling reasons for exceeding the sentencing guidelines. We disagree.

Defendant's reckless disregard for others was accounted for in Offense Variable 17, MCL 777.47, and the fact that he was on probation at the time he committed the instant offenses was accounted for in Prior Record Variable 6, MCL 777.56. However, the undisputed evidence showed that defendant's act of driving on a busy street at nearly twice the speed limit resulted in the death of one person and disfiguring injuries to two other persons. Moreover, defendant had been on probation for only approximately one month before he committed the instant offenses. The fact that a person is on probation can constitute a substantial and compelling reason for exceeding the guidelines. *People v Hendrick*, 472 Mich 555; 697 NW2d 511 (2005). The

¹ Defendant does not challenge his sentences for felonious driving.

consequences of defendant's action are objective and verifiable, and irresistibly caught the attention of the trial court. The trial court did not err in determining that the consequences of defendant's reckless behavior and his disregard of the requirements of probation were not adequately accounted for in the guidelines, MCL 769.34(3)(b), and did not abuse its discretion by determining that these factors constituted substantial and compelling reasons for exceeding the guidelines. *Babcock, supra* at 265-269.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Donald S. Owens